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No. 79-678

IN THE

Supreme Court of the United States

October Term, 1980

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,

v.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal From The California Court Of Appeal,
Fourth Appellate District, Division One

REPLY BRIEF

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I.

INTRODUCTION

Appellant, San Diego Gas & Electric Company (hereinafter "property owner") respectfully submits the following reply brief in partial response to the brief of Appellee, City of San Diego (hereinafter "City"), and numerous *amici curiae* briefs in support of Appellee filed concurrently. With a total of more than 80 pages of briefs by the parties and 13 *amici curiae* briefs on file already, property owner will resist the temptation to respond at length and be mercifully brief.

It is, however, essential to refocus the issues of *this case* after the concerted efforts by *amici curiae* in support of Appellee to transform the case into one of their own wishing by wholly unwarranted and pernicious attempts to "supplement" the record after the fact, raise new defenses never before raised by the parties, and inject spurious issues.[1]

Despite the fact that the Court's decision in this case may have profound precedential effect, the case is still before this Court on the record made in the court below and should be so determined.

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[1] See particularly (or more precisely *disregard* particularly) the *Amici Curiae Brief of California Coastal Commission*, et al., and *Brief of Conservation Foundation*, et al., as *amici curiae* in support of Appellees and their highly improper inclusion of photographs, charts, and purported facts not in the record or not even in existence at the time of trial. Such references are not only in blatant disregard of Court rules (Rules 34.6 and 36.5) but are also erroneous and misleading in many respects. It would be fundamentally unfair to require or expect Appellant to respond to such extraneous matters and Appellant will not dignify those desperate attempts to modify the record at this late date with a response. Rather it is requested that this Court disregard and strike said briefs pursuant to Rule 34.6.

When viewed in this light, the central issue emerges clearly:

- Property owner established a federal constitutional "taking" to the satisfaction of the trial court.

- Property owner established a federal constitutional "taking" to the satisfaction of the California Court of Appeal.

- The California Supreme Court with its *Agins* decision purported to establish a state immunity against damages for federal constitutional takings in the area of land use regulation.

- The California Court of Appeal repudiated its prior finding of a federal constitutional "taking" *solely* on the basis of the purported state immunity promulgated by the California Supreme Court.

Thus, the central issue is:

> "Will this Court permit a state created immunity to bar redress of a violation of the federal constitution in the taking of private property without just compensation under the guise of the police power?"

A trilogy of recent cases from this Court --

> *Owen v. City of Independence,*
> ____ U.S. ____, 100 S.Ct. 1398 (1980)
>
> *Martinez v. State of California,*
> ____ U.S. ____, 100 S.Ct. 553 (1980)
>
> *Kaiser-Aetna v. United States,*
> 444 U.S. 164 (1979)

would seem to indicate that the answer is a resounding "*no*"!

II.

THIS IS A "TAKING" CASE -- THE COURTS BELOW *TWICE* SO FOUND

A. The Trial Court Found A Federal Constitutional "*Taking*".

Appellee City asserts that this is not a "taking" case. Not so! The trial court after a lengthy trial and on a fully developed record found a federal constitutional taking:

> "The continuing course of conduct of the defendant City culminating in June of 1973, and, in particular, the designation of substantially all of the subject property as open space as previously described above, plaintiff has been deprived of all practical, beneficial or economic use of the property designated as open space, and has further suffered severance damage with respect to the balance of the subject property."
> Finding of Fact No. 29.

> "The actions of defendant City against plaintiff's property were motivated to achieve a public purpose, namely, preservation of open space, without payment of just compensation and were so burdensome and oppressive as to deprive plaintiff of any practical, beneficial or economic use of the property designated as open space, and, therefore, taken as a whole, *constitute a taking* of the portion of plaintiff's property designated as open space *without due process of law and just compensation within the meaning of the California and United States constitutions*, and further constitute a damaging of the remainder of the larger parcel of plaintiff's property."
> Conclusion of Law No. 1 (emphasis added).

> Joint Appendix, 41-43.

B. The "Taking" Was Based Not On A Single Act Or Regulation But Upon The Overall Impact Of A Course Of Conduct By The City.

Appellee City persists in trying to isolate and segregate individual aspects of the City's conduct and justify each separate category -- but the impact was not so realized. The conduct was cumulative and continuing. City ignores the synergistic effect of the various aspects of the City's conduct:

- Rezoning to very limited use property formerly designated for industrial use.

  [Finding of Fact No. 22, Joint Appendix 40]

- Violation of procedural due process in failing to give adequate notice of change in proposal.

  [Finding of Fact No. 20, Joint Appendix 40]

- Designation as open space lands which only two weeks earlier had been zoned industrial.

  [Findings of Fact Nos. 22, 23, Joint Appendix 40-41]

- Employment of a consistency policy which deprived property owner of all practical, beneficial or economic use of the property.

  [Finding of Fact No. 30, Joint Appendix 42]

- Taking formal action to condemn the property for public use and later abandoning formal action when desired result achieved without formal action.

  [Finding of Fact No. 16, Joint Appendix 38; Finding of Fact No. 26, Joint Appendix 41]

- Rendering the property unmarketable.

  [Finding of Fact No. 33, Joint Appendix 42]

- Causing the property to be devoted to use by the public as open space without payment of just compensation.

  [Finding of Fact No. 31, Joint Appendix 42]

As was found by the trial court, it was the actions of the City "*taken as a whole*," which constitute a "*taking*", "without due process of law and just compensation within the meaning of the California and United States constitutions." Conclusion of Law No. 1, Joint Appendix 42-43.

C. The California Court Of Appeal Found A Federal Constitutional "*Taking*".

The California Court of Appeal, in its initial opinion, expressly affirmed the finding of a federal constitutional taking. The court stated:

> "City challenges the support for and validity of Conclusion of Law #1 which states:
>
> '1. The actions of defendant City . . . taken as a whole, *constitute a taking* . . . of plaintiff's property . . . without due process of law and just compensation *within the meaning* of the California and *United States constitutions*, . . .'
>
> . . . .
>
> [There] is substantial evidence to support the trial court's conclusion."
>
> Joint Appendix 60-61 (emphasis added).

D. The California Court Of Appeal's Determination Of A "Taking" Was Based Upon The Overall Impact Of A Course Of Conduct -- Not A Single Act Or Regulation.

Like the trial court, the California Court of Appeal in its initial opinion based its finding of a federal constitutional taking upon the impact of a course of conduct -- not a single act or regulation:

> ". . . it was not the rezoning in itself which resulted in the taking. Rather, [property owner] owns land which because of its peculiar geographic situation and topography has a very limited number of uses. It is the *combination* of this and other factors, such as zoning, general plan, the 'consistency' policy, and the resolution to acquire property which led to the condemnation."
> Joint Appendix 59 (emphasis added).

Likewise, in regard to the synergistic impact of the various actions, the California Court of Appeal stated:

> "There is no evidence of actual physical invasion of the property. However, this is exactly what the City was trying to do by acquiring the property, that is, keep it from being used . . . The objective here is to have the property remain unused, undisturbed and in its natural state so open space and scenic vistas may be preserved. In this sense the property is being 'used' by the public as it has been ever since the date when all of the factors coalesced to effect the taking."
> Joint Appendix 60.

III.

THE FINDING OF A "TAKING" WAS REVERSED AND THE MONEY JUDGMENT NULLIFIED *ONLY* AFTER THE *AGINS* DECISION PURPORTEDLY CREATED A STATE IMMUNITY AGAINST MONEY DAMAGE CLAIMS

The finding of a federal constitutional taking was repudiated only after the promulgation by the California Supreme Court of the *Agins* decision and its purported state immunity against money damage claims. The terse second opinion of the California Court of Appeal will admit no other interpretation.

There, the court stated:

> "After our original affirmance, the California Supreme Court granted a petition for hearing. The case has now been retransferred to us for reconsideration in light of *Agins v. City of Tiburon,* 23 Cal.3d 605.
>
> A local entity's arbitrary unconstitutional exercise of the police power which deprives the owner of the beneficial use of his land does not require compensation; . . .
>
> The judgment is reversed."
>
> Joint Appendix 63, 66.

The result is inescapable. The same panel of appellate court justices who had previously found a federal constitutional taking, on the same record now found no taking and no right to compensation. Why? Because they had been told by the highest state court that

> "A LOCAL ENTITY'S ARBITRARY UNCONSTITUTIONAL EXERCISE OF THE POLICY POWER

WHICH DEPRIVES THE OWNER OF THE BENEFICIAL USE OF HIS LAND DOES NOT REQUIRE COMPENSATION; . . ."

Joint Appendix 66 (emphasis added).

There is no adequate state ground -- no want of a substantial federal question. The California Court of Appeal was told by the highest state court that no compensation was required for the arbitrary unconstitutional taking of private property, and the court acted accordingly. It is the interposition of this purported unqualified state created immunity as a bar to federal constitutional rights that Appellant property owner challenges.

IV.

THE PURPORTED STATE IMMUNITY CANNOT STAND IN THE WAY OF VINDICATION OF FEDERAL CONSTITUTIONAL RIGHTS

By any one of several rationales, the federal claims were properly before the California state courts and the California state courts accepted jurisdiction. See, *Martinez v. State of California*, ____ U.S. ____, 100 S.Ct. 553, 558 n. 7 (1980). Litigation of the federal claims is supported either (a) as a federal inverse condemnation cause of action; (b) as a federal constitutional tort cause of action under the rationale of *Bivens v. Six Unknown Narcotics Agents,* 403 U.S. 388 (1971); or (c) as a form of federal civil rights action under 42 U.S.C. § 1983 (see, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391 (1979)).

Under similar circumstances just last term, this Court declared that state immunity devices cannot control a federal claim being litigated in state courts. That case involved a state statute, but state common law

should fare no better. As the Court so eloquently stated in *Martinez v. State of California, supra*, at 558 n. 8:

> "A construction of a federal statute [or presumably a federal cause of action] which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced."

Neither the Fifth Amendment, the federal inverse condemnation cause of action, the *Bivens*-type federal constitutional tort, nor 42 U.S.C. § 1983, would have meaning if states could interpose their own concepts of immunity. As was stated in *Martinez*, the immunity claim raises a question of federal law. 100 S.Ct. 558 n. 8.

V.

THE "HARMFUL USE" DEFENSE IS A SPURIOUS AFTERTHOUGHT -- NEVER LITIGATED BELOW AND REFUTED BY THE FACTS IN THE RECORD

Various *amici* on behalf of Appellee City argue that City's actions were aimed at controlling a "harmful use" and are thereby immune from constitutional constraints. That position was not asserted by the City below -- and for good reason! City had acknowledged repeatedly that development of substantial portions of the property would not be a "harmful use." Almost all of the property was designated for industrial use in the City's 1967 General Plan. That designation was reaffirmed repeatedly through 1972. (Finding of Fact No. 7, Joint Appendix 37). Until June of 1973, a substantial portion of the property was zoned for industrial use. Even after June of 1973, a portion of the property was zoned for industrial use. (Finding of Fact No. 22, Joint Appendix 40).

The trial court found that the highest and best use of the property was for an industrial park and related buffer areas. (Finding of Fact No. 27, Joint Appendix 41.)

An expert planning witness testified that "it would be a prudent and certainly normal development decision to construct an industrial park in a flood plain of this nature," and referred to other similar experiences in Mission Valley, another flood plain area in San Diego, which is developed with commercial uses. (Joint Appendix 106.) A review of the pictorial exhibits in the record will illustrate that industrial development has proceeded down the Sorrento Valley southeast of the subject property until it has substantially filled out up to the subject property. (Finding of Fact No. 8, Joint Appendix 37.)

The "harmful use" issue was never in issue between *the parties* to *this action*. It is a red herring dredged up by *amici* and should be accorded treatment appropriate for dead fish.

VI.

THE SO-CALLED EQUITABLE REMEDIES ARE *INADEQUATE* AND *INEQUITABLE* -- NO SUBSTITUTE FOR JUST COMPENSATION

Thousands of words have been written by Appellee and its *amici*, seeking to convince this Court that only equitable remedies are necessary and that they are adequate substitutes for monetary just compensation, but talk is cheap. With commendable candor, the Solicitor General of the United States exposes the real force behind the words -- not the concerns of philosophical or academic nature, *nor* constitutional concerns -- but financial concerns:

> ". . . as the damage award in the present case illustrates, recoveries in such cases [inverse condemnation] are likely to be substantially larger than those in other types

of constitutional tort suits."
(Brief of the United States as Amicus Curiae, at 30.)

Does this mean that it is acceptable to offer a damage remedy for violations of the Fourth and Eighth Amendments because the usual plaintiff does not have much appeal to a jury, but offer no damage remedy for violations of the Fifth Amendment because it might cost the government too much? Since when is the level of protection for constitutional rights determined by the cost (or potential cost) to the government?

This Court considered similar arguments last term and in the case of *Owen v. City of Independence,* 100 S.Ct. 1398 (1980), came down strongly in favor of compensation for a citizen whose constitutional rights had been violated. The eloquent words of the Court there were:

> "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. *Owen, supra* at 1415.
>
> . . . .
>
> . . . the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those 'systemic' injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith. *Owen, supra* at 1416.
>
> . . . .

It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby. *Owen, supra* at 1417.

. . . .

After all, it is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration. Thus, even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated. *Owen, supra* at 1417.

. . . .

More important, though, is the realization that consideration of the *municipality's* liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. As one commentator aptly put it, 'Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions. To criticize section 1983 liability because it leads decisionmakers to avoid the infringement of constitutional rights is to criticize one of the statute's *raisons d'etre.*'" *Owen, supra* at 1418.

Appellant includes the language of the Court at some length because it could not improve upon this forceful statement of the need for the damage remedy in this area. These inspiring principles stand in stark contrast to the current dismal state of the law in California regarding Fifth Amendment guarantees, where the California Court of Appeal is required to state:

> "A local entity's *arbitrary unconstitutional* exercise of the police power which deprives the owner of the beneficial use of his land *does not require compensation*; rather the party's remedy is administrative mandamus (*Agins v. City of Tiburon, supra,* 23 Cal.3d 605, 611)."
>
> Joint Appendix, 66 (emphasis added).

How do you take a petition for writ of mandamus against a continuing course of conduct? What do you mandate? An apology? What about the delay and expense and lost opportunities and blight by reason of litigation for equitable remedies? What if the property owner is successful after years of litigation in obtaining equitable relief, only to find that on remand, the local government entity adopts a similar but slightly different regulation or series of regulations which must be challenged all over again?[2]

The suggested equitable remedies are woefully inadequate -- no substitute for monetary just compensation. For further discussion, see *Brief of the National Association of Manufacturers of the United States of America* as *amicus curiae* in support of Appellant, pp. 9-22, and *Brief of Amicus Curiae San Diego Urban League, Inc.* in support of Appellant, pp. 9-20.

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[2] See, Joint Appendix, 165-68, for a realistic scenario of how this might occur.

CONCLUSION

By reason of a course of conduct by the City aimed at achieving a public purpose, property owner has been denied all practical, beneficial and economic use of its property, the property has for all practical purposes been devoted to the public use which was originally sought through direct condemnation, all without payment of the just compensation guaranteed by the Fifth Amendment.

State courts cannot immunize local government entities from the financial consequences of such arbitrary unconstitutional exercises of the police power. The only constitutionally adequate remedy is money damages.

The judgment below should be reversed and the trial court's judgment for money damages reinstated.

Respectfully submitted,

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